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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17 to 26 April 2018

Opinion No. 38/2018 concerning Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani (Iraq)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended it for a three-year period in its resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 23 January 2018 the Working Group transmitted to the Government of Iraq a communication concerning Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

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3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. According to the source, the following 24 Iraqi citizens are all employees or persons with alleged personal connections with the former Vice-President, Tariq Al Hashimi. They were all arrested by the Iraqi Security Forces between November 2011 and March 2012, secretly detained and tortured. Several of the individuals were sentenced to death under the Anti-Terrorism Law No. 13 of 2005 by the Central Criminal Court of Iraq, while others were sentenced to life imprisonment or 15 years of imprisonment. In a few cases, the terrorism charges were dropped but the individuals remain detained on other charges.[1]

5. Mohammed Hamid Ali Abdullah Al Jabouri was born in 1982 in Al Suwaira, Wasit Governorate. He usually resides in Al Suwaira. He is single and worked until 2009 as one of Mr. Al Hashimi's personal bodyguards. He was working as a farmer before being arrested on 21 May 2013.

6. Mohammed Nehme Abbas Mahmoud Al Jabouri was born in 1982 in Al Suwaira, Wasit Governorate. He usually resides in Al Suwaira. He is married and used to work as a farmer having been one of Mr. Al Hashimi's bodyguards until 2012. He is not related to Mohammed Hamid Ali Abdullah Al Jabouri. He was arrested on 21 May 2013.

7. Ahmad Ali Najim Rsan Al Abadi, born in 1977 in Baghdad, is married and the father of two children. He usually resides in Saidiya neighbourhood, Baghdad. He used to work as one of the personal bodyguards of Mr. Al Hashimi. He was arrested on 26 January 2012.

8. Omar Ali Najim Rsan Al Abadi, born in 1980 in Baghdad, is married and the father of three children. He usually resides in Saidiya neighbourhood, Baghdad. He used to work as one of Mr. Al Hashimi's personal bodyguards. He is the brother of Mr. Ahmad Ali Najim Rsan Al Abadi. He was arrested on 26 January 2012.

9. Uday Hafiz Abbas Ali Al Ali, born in 1971 in Baghdad, is married and the father of two children. He usually resides in Al Rachid district, Baghdad. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 27 December 2011.

[1] For the details on each individual, please refer to the table in the annex to the present opinion.

10. Ali Adel AbdelKarim Ismail Al Hashemi, born in 1982 in Anbar, usually resides in Anbar. Mr. Al Hashemi is single and used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 9 June 2012.

11. Mazen Ahmad Sattar Hasan Al Obaidi, born in 1973 in Baghdad, normally resides in Adamiyah neighbourhood in Baghdad. Mr. Al Obaidi is married and the father of four children. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 18 September 2012.

12. Riad Abdullah Razik, born in 1961, in Al Anabr, is married and the father of five children and usually resides in Yarmouk neighbourhood in Baghdad. He used to work as one of the personal bodyguards of Mr. Al Hashimi. He was arrested on 26 February 2012.

13. Mohammad Shawki Saoud Rahim Al Kubaisi, born in 1979 in Baghdad, usually resides in Yarmouk neighbourhood in Baghdad. He is married and used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 13 November 2011. The source reports that Mr. Al Kubaisi is the brother of Ahmad Al Kubaisi, whose detention was deemed arbitrary by the Working Group in its opinion No. 33/2017.

14. Buraq Abdel Ilah Jassim Mohamad Al Habsh, born in 1978 in Baghdad, usually lives in Yarmouk neighbourhood in Baghdad. He is single and used to work for the Iraqi Independent High Electoral Commission. He was arrested on 31 January 2012 on the accusation that he was one of Mr. Al Hashimi's bodyguards. However, according to the source, this information originated from a confession obtained through coercion from Qais Qader Mohammad Ali Abbas Al Bayati, whose detention was deemed arbitrary by the Working Group in its opinion No. 33/2017.

15. Qusay Saeed Abed Abbas Al Mashhadani, born in 1978, is married and normally lives in Tarmiyah town in the Saladin Governorate. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 26 July 2012.

16. Malik Abed Sultan Hamad, born in 1971, is married and normally lives in Al Rachid neighbourhood, Baghdad. Mr. Hamad used to work as an imam in a mosque. He was arrested on 19 December 2011 and forced to confess under torture that he had previously worked as a bodyguard for Mr. Al Hashimi.

17. Mohammad Firas Bahr Shati, born in 1976, usually resides in Al Rachid neighbourhood in Baghdad. Mr. Shati is married and used to work as a guard. He was arrested on 19 December 2011 and forced to confess under torture that he had previously worked as a bodyguard for Mr. Al Hashimi.

18. Hammad Zaidan Khalaf Al Fahdawi, born in 1970, is married and usually lives in Baghdad. He used to work as a real-estate consultant. According to the source, Mr. Al Fahdawi has no relationship with Mr. Al Hashimi, but he was informed that his name had been cited in the confession of a detainee. He was arrested on 17 March 2012.

19. Abdul Razak Abdul Rahman Hasan Al Dulaimi, born in 1982, usually resides in Baghdad. He is single and used to work as one of Mr. Al Hashimi's bodyguards. He was arrested on 19 December 2011.

20. Rafid Walid Rachid Majid Al Obaidi, born in 1987, usually resides in Adamiyah, Baghdad. He is married and the father of two children. Until he resigned, he worked for seven months as a bodyguard for Mr. Al Hashimi. Prior to his arrest, he was working in a bakery in Adamiyah, Baghdad. He was arrested on 18 September 2012.

21. Hicham Ali Nayef Shatr, born in 1975, is married and the father of three children. He usually resides in Baghdad and used to work as one of Mr. Al Hashimi's bodyguards. He was arrested on 19 December 2011.

22. Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, born in 1985 in Baghdad, is single and usually resides in Wazireya neighbourhood in Baghdad Province. He used to work as a doctor in the bodyguards' unit attached to Mr. Al Hashimi. He was arrested on 11 July 2012.

23. Ismail Nasif Jassim Al Mashhadani, born in 1971 in Al Tarmia, Saladin province, is married and the father of seven children. He usually resides in Al Tarmia town, Saladin

Province. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 26 December 2011.

24. Ali Moussa Hussein Al Ameri, born in 1982, is married and the father of three children. He used to reside in Diyala. He also used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 20 December 2011.

25. Salam Ashour Khalil Ibrahim Al Jumaili was born in 1980. He is married, and the father of five children. He used to live in Al Khalis District in Diyala Province and worked as one of Mr. Al Hashimi's bodyguards. He was arrested on 26 July 2012.

26. Loay Obaid Ibrahim Salloum, born in 1989, is married and usually lives in Yusufiyah, Baghdad Province. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was also employed by the Ministry of Oil. He was arrested on 22 October 2012.

27. Qusay Obaid Ibrahim Salloum was born in 1987. He is single and normally lives in Yusufiyah, Baghdad Province. He used to work as a civil servant at the Ministry of Finance in Al Dora. He was arrested on 22 October 2012. Loay Obaid Ibrahim Salloum and Qusay Obaid Ibrahim Salloum are brothers.

28. Saad Alwan Hamadi Yassin Al Mashhadani, born in 1973 in Baghdad, is married. He usually lives in Al Tarmia town in the Saladin Governorate. He used to work as one of Mr. Al Hashimi's personal bodyguards. He was arrested on 2 January 2012.

Background

29. The source submits that the above cases illustrate a pattern of arbitrary detention of employees or persons with alleged connections with the former Vice-President of Iraq, Tariq Al Hashimi.

30. Mr. Al Hashimi was a leading member of the secular Al Iraquiya coalition and former Prime Minister Al Maliki's main electoral rival. He was a well-known critical voice of what he saw as Mr. Al Maliki's attempts to centralize power.

31. According to the source, in December 2011, in an escalation of tension between Mr. Al Maliki and Mr. Al Hashimi, at odds over the formation of a unity Government, the Iraqi Security Forces, under the orders of former Prime Minister Al Maliki, raided Mr. Al Hashimi's house, but did not find him there. He had left Baghdad on 18 December 2011 and fled first to the semi-autonomous Iraqi region of Kurdistan. He then left Kurdistan for security reasons to seek refuge in Turkey. The source reports that in retaliation, all members of his staff were arrested and individuals close to him allegedly continue to be victim of reprisals by the Iraqi authorities. On 19 December 2011, the Iraqi Ministry of the Interior announced during a press conference that an arrest warrant had been issued against Mr. Al Hashimi for having "orchestrated bombing attacks". During the conference, confessions at gunpoint of three of his bodyguards, who had been severely tortured and were still bearing signs of torture, were aired on the State-run channel Al Iraquiya, confirming that Mr. Al Hashimi had orchestrated such attacks.

32. According to the source, on 9 September 2012, Mr. Al Hashimi was sentenced to death in absentia by the Central Criminal Court, on the basis of his bodyguards' coerced testimonies. In November 2012, the Court issued a second death sentence against him for "plotting to assassinate government officials" and "having ordered bombings and other attacks from 2005 to 2011".

33. The source reports that between November 2011 and March 2012, the security services, tightly controlled by Prime Minister Al Maliki, carried out dozens of arrests targeting persons allegedly close to Mr. Al Hashimi, among them the individuals listed above. They were reportedly all taken to secret locations where they were severely tortured and forced to sign confessions incriminating themselves and Mr. Al Hashimi, on the basis of which they were later sentenced to death, life imprisonment or 15 years of imprisonment under the Anti-Terrorism Law No. 13 of 2005.

34. The source states that on 25 August 2016, the Iraqi parliament adopted the General Amnesty Law No. 27/2016, stipulating that individuals convicted between 2003 and the

enactment of the law are eligible to apply for amnesty, except those convicted of 13 types of crimes, including acts of terror resulting in death or permanent disability, human trafficking, rape, money laundering and embezzlement and theft of State funds. The Law provided for the creation of a judicial committee responsible for considering requests for retrials. Negative decisions can be appealed to the Court of Cassation. Under the present statute, most of the 24 above-mentioned individuals reportedly submitted requests for retrial to the Judicial Committee.

Analysis of violations

35. In the light of the information above, the source submits that all the cited cases fall within categories I, III and V of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

Category I: absence of legal basis justifying the deprivation of liberty

36. The source submits that all 24 individuals were arrested without a warrant being issued previously by a judicial authority, nor were they given any reasons for their arrest. Moreover, they were reportedly all detained in secret for periods ranging from three months to one year and a half, and thus placed outside the protection of the law.

37. During this period, they were systematically denied access to their families and lawyers and unable to challenge the lawfulness of their detention. Neither their respective families nor their lawyers were able to obtain information on their fate or whereabouts, or the charges held against them.

38. The source thus argues that the detention of the 24 above-mentioned individuals lacks a legal basis and constitutes a violation of article 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights, falling within category I.

Category III: non-observance of international fair trial norms

Arbitrary arrest and secret detention

39. According to the source, all the 24 individuals were arrested without being provided with an arrest warrant and without being informed of the reasons for their arrest. This violates article 92 of the Iraqi Criminal Code and articles 9 (1) and (2) of the Covenant.

40. Furthermore, the individuals were reportedly all detained incommunicado in secret locations, without being allowed any contact with the outside world, for a period ranging from 3 to 18 months. The source notes that, given that they put detainees completely outside the protection of the law, incommunicado and secret detention are prima facie arbitrary and violate the right to habeas corpus, as well as the right to be recognized as a person before the law (article 16 of the Covenant). Secret detention also constitutes a violation of the positive obligations of the authorities to ensure respect for the right to life of detainees, and it amounts to torture and inhuman and degrading treatment.

41. The source notes that in 2015, following its review of Iraq, the Committee against Torture raised concern over "questionable judicial practices under the 2005 Anti-Terrorist Law and the Code of Criminal Procedure, such as arrests without warrants, protracted pretrial detention, indefinite detention of suspects, and convictions based on the testimony of secret informants" (see CAT/C/IRQ/CO/1, para. 23).

Torture and coerced confessions

42. In addition, all the individuals listed above were allegedly subjected to torture through, inter alia, severe beatings, electrocution and threats, in violation of article 37 (1) (c) of the Iraqi Constitution prohibiting torture, articles 7 and 10 of the Covenant and article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

43. The source further submits that in all cases, torture was used to extract confessions that were then used as material evidence to convict the accused. According to the source,

that represents a violation of article 127 of the Iraqi Code of Criminal Procedure, article 37 of the Iraqi Constitution, article 14 (3) (g) of the Covenant and article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The source notes that these violations fall within a pattern on which the Committee against Torture expressed concern, highlighting "routine and widespread use of torture and ill-treatment of suspects in police custody, as well as in pretrial detention centres run by the Ministries of the Interior and Defence, primarily to extract confessions or information to be used in criminal proceedings" (see CAT/C/IRQ/CO/1, para. 15).

Violation of the right to legal counsel

44. According to the source, none of the suspects were allowed to have their lawyers present during their interrogation nor to have their assistance during the investigative stage. They were reportedly only allowed to contact legal counsel during the trial. That violates article 19 (4) of the Iraqi Constitution, article 213 (b) (ii) of the Iraqi Criminal Code, and article 14 (1) and (3) (b) and (d) of the Covenant. It also violates principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Rights of Anyone Deprived of their Liberty to Bring Proceedings before a Court.

45. The source also refers to the findings of the Committee against Torture which, following its review of Iraq in 2015, concluded that "detainees are frequently deprived of timely access to a lawyer and a medical doctor, and of their right to notify a person of their choice. It is also concerned by allegations regarding the failure to maintain accurate registration records, adequately inform detained persons about their rights, and to adhere to the 24-hour limit for detainees to be brought before a judge (article 2)" (see CAT/C/IRQ/CO/1, para. 14).

Violation of the right to be tried promptly by an independent tribunal

46. In addition, the source submits that most of the individuals were only tried years after their arrest, in violation of their right to be tried without undue delay, guaranteed under article 14 (3) (c) of the Covenant. In the cases of Ismail Nasif Jassim Al Mashhadani and Abdul Razak Abdul Rahman Hasan Al Dulaimi, both were arrested in late 2011 and sentenced in 2017. In that respect, the source notes that under article 109 (b) of the Iraqi Code of Criminal Procedure, a person charged with the death penalty can be kept in detention "until the investigation phase is completed, or until the final decision is issued by the court in relation to the charges", therefore allowing for indefinite pretrial detention, in violation of article 9 (1) and (3) of the Covenant.

47. The source also argues that the trial of 24 individuals before the Central Criminal Court, a jurisdiction commonly known for not meeting international standards of due process, constitutes a violation of the right to a fair and public hearing by a competent, independent and impartial tribunal, pursuant to article 14 (1) of the Covenant. In that regard, the source recalls the findings of the Human Rights Committee which expressed concern over reports indicating that, "in practice, the judiciary is neither fully independent nor impartial" in Iraq (see CCPR/C/IRQ/CO/5, para. 35).

Violation of the right to defence

48. The source states that, while in secret detention, all 24 individuals were subjected to similar acts of torture in order to coerce them into self-incrimination. Despite the objections raised by their lawyers over the torture of their clients and the use of coerced evidence, the statements were reportedly used as incriminating evidence and no investigation was carried out into the torture allegations, in violation of article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

49. The source notes that the Human Rights Committee has previously raised concerns in this regard, notably "about allegations of instances in which death sentences have been imposed on the basis of confessions obtained under duress or torture, or otherwise in the context of trials that did not meet the standards of article 14 of the Covenant" (see CCPR/C/IRQ/CO/5, para. 27).

50. The source also asserts that the collective imposition of the death penalty in most of the reported cases, without regard to individual criminal responsibility, and following a flawed procedure, during which forced confessions were admitted as evidence, violates article 6 (2) of the Covenant. According to the source, the systematic issuance of death sentences in a judicial system which "presents significant risks of grievous and irreversible miscarriages of justice"[2] constitutes a violation of the right to life.

51. The source thus submits that in light of the multiple violations of fundamental guarantees and the right to a fair trial carried out against all 24 individuals, their detention falls within category III. The source notes that, as a consequence, should the death penalty be carried out, the resulting deprivation of life would be arbitrary under article 6 of the Covenant.

Category V: for reasons of discrimination

52. The source furthermore submits that the arbitrary arrest and subsequent violation of the fundamental rights of the 24 above-mentioned individuals are a consequence of their perceived political and sectarian affiliation, resulting in unequal treatment before the law.

53. More precisely, they were reportedly arrested, tortured and sentenced to death, life imprisonment or 15 years of imprisonment, following an unfair trial owing to their alleged political affiliation resulting from their real or perceived links with former Vice-President Al Hashimi.

54. The source recalls that all the individuals were associated with Mr. Al Hashimi, and that most of them were his employees. Nevertheless, the source notes with concern that some of the victims have been targeted for merely being relatives of his employees, such as Qusay Obaid Ibrahim Salloum, or for having had their names cited in confessions extracted under torture, such as Buraq Abdel Ilah Jassim Mohamad Al Habsh. In addition, some of the individuals were no longer working for Mr. Al Hashimi, including Mohammed Hamid Ali Abdullah Al Jabouri and Mohammed Nehme Abbas Mahmoud Al Jabouri.

55. The source recalls the Working Group's opinion No. 33/2017 regarding 19 individuals arbitrarily detained for similar reasons, in which it concluded that it was "difficult … not to conclude that they have been subjected to apparently neutral but actually discriminatory wheels of justice" (see A/HRC/WGAD/2017/33, para. 99).

Response from the Government

56. On 23 January 2018, the Working Group transmitted the allegations from the source to the Government of Iraq through its regular communication procedure. The Working Group requested the Government to provide, by 23 March 2018, detailed information about the current situation of the 24 above-mentioned individuals and any comments on the source's allegations.

57. The Working Group regrets that it did not receive a response from the Government to that communication. Nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

58. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

59. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

[2] See United Nations Assistance Mission for Iraq and Office of the United Nations High Commissioner for Human Rights, "Report on the death penalty in Iraq" (Baghdad, October 2014), p. 26.

60. The Working Group wishes to reaffirm that the Government has the obligation to respect, protect and fulfil the right to liberty of person and that any national law allowing deprivation of liberty should be made and implemented in conformity with the relevant international standards set forth in the Universal Declaration of Human Rights and other applicable international or regional instruments.[3] Consequently, even if the detention is in conformity with national legislation, regulations and practices, the Working Group must assess whether such detention is also consistent with the relevant provisions of international human rights law.[4] The Working Group considers that it is entitled to assess the proceedings of a court and the law itself to determine whether they meet international standards.[5]

Category I

61. The Working Group will first determine whether it is clearly impossible to invoke any legal basis to justify the arrest and detention of the 24 individuals that would render it arbitrary in terms of category I.

62. The source has alleged, and the Government has chosen not to contest, that the 24 individuals were not presented with a judicially approved warrant and were not informed of the reasons for their arrest.

63. The Working Group notes that any deprivation of liberty without an arrest warrant issued by a competent, independent and impartial judicial authority is arbitrary and lacks any legal basis in violation of articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the Covenant as well as principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[6]

64. The Working Group further notes that the 24 individuals were subsequently held in incommunicado detention in a secret location for a period ranging from three months to one year and a half without being presented before a judge, thereby depriving them of their right to challenge the lawfulness of their deprivation of liberty, in violation of article 9 (4) of the Covenant.

65. The Working Group has, in its practice, consistently argued that holding persons incommunicado breaches the right to challenge the lawfulness of detention before a judge.[7] Articles 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention. The Working Group notes that the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has consistently argued that the use of incommunicado detention is unlawful,[8] and the Human Rights Committee in its general comment No. 35 (2014) on liberty and security of person, argued that incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3) of the Covenant. Furthermore, the Working Group notes that the 24 individuals were allegedly subjected to torture through, inter alia, severe beatings, electrocution and threats. Such practices of torture would have made it difficult for the victims to initiate proper judicial proceedings in order to challenge the lawfulness of their detention.

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[3] See General Assembly resolution 72/180 preambular para. 5, Commission on Human Rights resolutions 1991/42 para. 2 and 1997/50, para. 15, and Human Rights Council resolutions 6/4, para. 1 (a), 10/9, para. 4 (b); opinions No. 94/2017, para. 59; No. 88/2017, para. 32; No. 83/2017, paras. 51 and 70; No. 76/2017, para. 62; No. 28/2015, para. 41; and No. 41/2014, para. 24.

[4] See opinions No. 94/2017, para. 47; No. 76/2017, para. 49; No. 1/2003, para. 17; No. 5/1999, para. 15; and No. 1/1998, para. 13.

[5] See opinions No. 94/2017, para. 48; No. 88/2017, para. 24; No. 83/2017, para. 60; No. 76/2017, para. 50; and No. 33/2015, para. 80.

[6] See opinions No. 76/2017, para. 55; 63/2017, para. 66; No. 21/2017, para. 46; and No. 48/2016, para. 48.

[7] See, for example, opinions No. 53/2016 and No. 56/2016.

[8] See, for example, A/54/426, para. 42, and A/HRC/13/39/Add.5, para. 156.

66. The Working Group also recalls that in 2010, it completed a joint study with several other special procedure mandate holders on global practices in relation to secret detention in the context of counter-terrorism (A/HRC/13/42). The experts reiterated that international law prohibited secret detention, which violates several human rights norms, including the right to fair trial (see A/HRC/13/42, paras. 27 and 282). The experts found that certain practices inherent in secret detention, such as the use of secrecy and insecurity caused by the denial of contact with the outside world, placed detainees in a situation of heightened vulnerability to violations of the right to a fair trial, including forced confession of guilt, denial of the presumption of innocence, inability to challenge the lawfulness of detention, denial of access to legal representation and torture and ill-treatment.[9] Moreover, in its resolution 37/3, the Human Rights Council stressed that no one should be held in secret detention and urged States to ensure that all persons held in detention under their authority were provided with access to the courts and to investigate all alleged cases of secret detention, including under the pretext of counter-terrorism.

67. The Working Group therefore considers that the arrest and prolonged incommunicado detention in a secret location of the 24 individuals lack any legal basis in violation of articles 3, 6 and 9 of the Universal Declaration of Human Rights, articles 9, 14 and 16 of the Covenant and principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Working Group thus concludes that their detention is arbitrary, falling within category I.[10]

Category III

68. The Working Group will now consider whether the alleged violations of the right to a fair trial and due process suffered by the 24 individuals were of such gravity as to give their deprivation of liberty an arbitrary character, thus falling within category III.

69. The relevant yet not exhaustive factual and legal considerations, which have not been disputed by the Government, are illustrated below:[11]

(a) As noted above, none of the 24 individuals were promptly brought before a judge but instead held incommunicado in a secret place of detention outside the protection of the law for periods of three months to one year and a half, which effectively nullified their right to recognition everywhere as a person before the law, their right to challenge the lawfulness of their deprivation of liberty, to have adequate time and facilities for the preparation of their defence and to communicate freely with counsel of their own choosing (articles 6 and 9–11 of the Universal Declaration of Human Rights and articles 9 (3), 14 (3) (b) and (c) and 16 of the Covenant);[12]

(b) None of the 24 individuals were treated with humanity and all were subjected to various forms of torture and ill-treatment, including beatings, electrocution, rape and threats of rape directed at mothers and sisters. All of the 24 individuals were forced to sign confessions extracted under severe torture and ill-treatment, which were reportedly presented as the material evidence for their convictions by the Central Criminal Court (articles 3, 5, 11 (1) and 12 of the Universal Declaration of Human Rights and articles 7, 9 (1), 10 (1), 14 (3) (g) and 17 of the Covenant);

(c) All 24 individuals were interrogated without their lawyers being present, in violation of articles 10 and 11 (1) of the Universal Declaration of Human Rights, article 14 (1) and (3) (b) and (d) of the Covenant, article 19 (4) of the Iraqi Constitution and articles 123 (b) (2) and (c) and 144 of the Code of Criminal Procedure, ensuring the right to an attorney during all phases of the investigation and the trial;

[9] See opinions No. 14/2009, para. 21; and No. 5/2001, para. 10 (iii), in which the Working Group found that secret detention was per se a violation of the right to a fair trial under category III.

[10] See opinions No. 76/2017, para. 61; No. 63/2017, para. 53; No. 21/2017, para. 37; No. 17/2017, para. 37; *and No. 39/2016, para. 45.*

[11] For the details on each individual, please refer to the table in the annex to the present opinion.

[12] See A/HRC/13/42, para. 26, and Human Rights Council resolution 37/3, paras. 6 and 8.

(d) Most of the 24 individuals were only tried after a number of years (six years in the cases of Ismail Nasif Jassim Al Mashhadani and Abdul Razak Abdul Rahman Hasan Al Dulaimi) after their arrest, in violation of their right to be tried without undue delay (article 11 (1) of the Universal Declaration of Human Rights and article 14 (3) (c) of the Covenant).

70. With regard to access to legal assistance, the Working Group notes that all 24 individuals were interrogated without their lawyers being present and that some of them were not allowed to contact their lawyers during their trials or were prevented from contacting their lawyers in order to prepare their defence. The Working Group emphasizes that denial of legal assistance is a violation of article 14 (3) (b) and (d) of the Covenant, of principle 17 (1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and of principle 9 of the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court.

71. The Working Group emphasizes that torture is prohibited under article 5 of the Universal Declaration of Human Rights and articles 7 and 10 of the Covenant, and the use of torture to extract confession or the use of such confessions are also prohibited, in particular under article 14 (3) (g) of the Covenant and article 15 of the Convention against Torture.[13] Domestic law must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from the evidence.

72. Especially in light of the death sentences imposed, the Working Group considers that the imposition of the death penalty following such a flawed procedure is, in itself, in violation of article 6 (2) of the Covenant, which provides that a death sentence may be imposed only if it is not contrary to the provisions of the Covenant.[14] The death sentences passed against 14 of the 24 individuals, based on confessions extracted under torture, are in particular a miscarriage of procedural justice, including their right to a fair trial. According to the safeguards guaranteeing protection of the rights of those facing the death penalty of 25 May 1984, capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence, leaving no room for an alternative explanation of the facts. That is hardly the case in relation to the trial and conviction of the 14 individuals.

73. In the light of the foregoing, the Working Group concludes that the violations of the fair trial rights of the 24 individuals are of such gravity as to render their deprivation of liberty arbitrary, falling within category III.

Category V

74. The Working Group will now examine whether the deprivation of liberty of the 24 individuals constitutes illegal discrimination under international law, falling within category V.

75. The Working Group is persuaded that all of the 24 accused had real or perceived connections with Mr. Al-Hashimi. Most of them were or had been working as his bodyguards.

76. The Working Group emphasizes that the principle of individual criminal responsibility is one of the most fundamental tenets of the criminal law, as it has ousted the odious practice of collective punishment or guilt by association.

77. In the present case, which involves 24 individuals with alleged connections to Mr. Al-Hashimi, it is difficult for the Working Group not to conclude that they have been

[13] The Working Group concurs with the Human Rights Committee when it stated, in paragraph 41 of its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, that article 14 (3) (g) guarantees the right not to be compelled to testify against oneself or to confess guilt and that, a fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant in order to extract a confession.

[14] See opinion No. 32/2017, para. 18. See also Human Rights Committee, general comment No. 6 (1982) on the right to life, para. 7.

caught up in apparently neutral but actually discriminatory wheels of justice, as it did in its opinion No. 33/2017 when it considered the case of 19 other individuals with similar connections to Mr. Al Hashimi.

78. The Working Group concludes that only discrimination based on political or other opinion — or, more precisely, what is perceived by the Government as such — that aims to ignore the equality of human beings may plausibly explain the subversion of the equal protection of the law experienced by the 24 individuals as observed above.

79. For those reasons, the Working Group considers that the deprivation of liberty of the 24 individuals constitutes a violation of article 2 of the Universal Declaration of Human Rights and articles 2 (1) and 26 of the Covenant on the grounds of discrimination based on political or other opinion aimed at and resulting in ignoring the equality of human beings and that it therefore falls under category V.

80. The Working Group recalls that, under certain circumstances, widespread or systematic imprisonment or other severe deprivation of liberty in violation of the rules of international law, may constitute crimes against humanity.

81. Given that the present case involves allegations of torture and ill-treatment, violation of fair trial and due process rights and counter-terrorism measures, the Working Group refers those matters to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

Disposition

82. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Uday Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani, being in contravention of articles 2, 5–6 and 9–11 of the Universal Declaration of Human Rights and articles 2, 6–7, 9–10, 14, 16 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, III and V.

83. Consequent upon the opinion rendered, the Working Group requests the Government of Iraq to take the steps necessary to remedy the situation of these 24 individuals without delay and bring it into conformity with the standards and principles set forth in the international norms on detention, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

84. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mohammed Hamid Ali Abdullah Al Jabouri, Mohammed Nehme Abbas Mahmoud Al Jabouri, Ahmad Ali Najim Rsan Al Abadi, Omar Ali Najim Rsan Al Abadi, Uday Hafiz Abbas Ali Al Ali, Ali Adel AbdelKarim Ismail Al Hashemi, Mazen Ahmad Sattar Hasan Al Obaidi, Riad Abdullah Razik, Mohammad Shawki Saoud Rahim Al Kubaisi, Buraq Abdel Ilah Jassim Mohamad Al Habsh, Qusay Saeed Abed Abbas Al Mashhadani, Malik Abed Sultan Hamad, Mohammad Firas Bahr Shati, Hammad Zaidan Khalaf Al Fahdawi, Abdul Razak Abdul Rahman Hasan Al Dulaimi, Rafid Walid Rachid Majid Al Obaidi, Hicham Ali Nayef Shatr, Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani, Ismail Nasif Jassim Al

Mashhadani, Ali Moussa Hussein Al Ameri, Salam Ashour Khalil Ibrahim Al Jumaili, Qusay Obaid Ibrahim Salloum, Loay Obaid Ibrahim Salloum and Saad Alwan Hamadi Yassin Al Mashhadani immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. The Working Group also urges the Government to put an end to the persecution of the 24 individuals and others with real or perceived connections with the former Vice-President Tariq Al Hashimi.

85. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of the 24 individuals, including their allegations of torture, and to take appropriate measures against those responsible for the violation of their rights.

86. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers this case to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on the independence of judges and lawyers, for appropriate action.

Follow-up procedure

87. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether the 24 individuals have been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to the 24 individuals;

(c) Whether an investigation has been conducted into the violation of the rights of the 24 individuals and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Iraq with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

88. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

89. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

90. The Government should disseminate through all available means the present opinion among all stakeholders.

91. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[15]

[*Adopted on 26 April 2018*]

[15] See Human Rights Council resolution 33/30, paras. 3 and 7.

Annex

Summary of factual elements concerning the detainees

Case number	Victim's name	Connection with Tariq Al Hashimi	Date of arrest	Arrest warrant	Access to lawyer/family	Duration of incommunicado detention	Interrogated without lawyer	Tortured	Sentence	Case number	Date of sentence	Appeal for retrial	Result	State of the proceedings
1	Mohammed Hamid Ali Abdullah Al Jabouri	Bodyguard until 2009	21/05/2013	No	No	6 months	Yes	Yes	Death	30/C1/2016	19/01/2016	Yes	Accepted on 11/05/2017	Awaiting retrial
2	Mohammed Nehme Abbas Mahmoud Al Jabouri	Bodyguard until 2012	21/05/2013	No	No	6 months	Yes	Yes	Death	30/C1/2016	19/01/2016	Yes	Accepted on 11/05/2017	Awaiting retrial
3	Ahmad Ali Najm Rsan Al Abadi	Bodyguard	26/01/2012	No	No	1 year and a half	Yes	Yes	15 years	1684/C2/2014	21/09/2015	Yes	Rejected on 19/11/2017	
4	Omar Ali Najm Rsan Al Abadi	Bodyguard	26/01/2012	No	No	1 year and a half	Yes	Yes	Life	1673/C3/2012	30/09/2012	Yes	Accepted on 8/10/2017	Charges dropped on 24/12/2017. Still detained on unknown charges
5	Uday Hafiz Abbas Ali Al Ali	Bodyguard	27/12/2011	No	No	8 months	Yes	Yes	15 years	2492/C3/2012	2/12/2012	Yes	Rejected on 27/12/2016	Appeal pending before Cassation Court
6	Ali Adel AbdelKarim Ismail Al Hashemi	Bodyguard	09/06/2012	No	No	5 months	Yes	Yes	Life	2639/C1/2012	7/12/2015	Yes	Pending	

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Case number	Victim's name	Connection with Jaafar Al Hashimi	Date of arrest	Arrest warrant	Access to lawyer/family	Duration of incommunicado detention	Interrogated without lawyer	Confessed	Sentence	Case number	Date of sentence	Request for retrial	Result	State of the proceedings
7	Mazen Ahmad Sattar Hasan Al Obaidi	Bodyguard	18/09/2012	No	No	4 months	Yes	Yes	Death	2598/C1/2014	10/03/2015	Yes	Accepted on 21/06/2017	Retried and declared innocent on 24/10/2017 but still detained on unknown charges
8	Riad Abdullah Razik	Bodyguard	26/02/2012	No	No	7 months	Yes	Yes	Death	1922/C3/2012	18/11/2012	Yes	Pending	
9	Mohammad Shawki Saoud Rahim Al Kubaisi	Bodyguard	13/11/2011	No	No	9 months	Yes	Yes	Death	451/C1/2013	23/06/2013	Yes	Rejected	Appeal pending before Cassation Court
10	Buraq Abdel Hah Jassim Mohamad Al Habsh	Via Qais Qader Mohammad Ali Abbas Al Bayati, Al Hashimi's bodyguard	4/02/2012	No	No	3 months	Yes	Yes	Life	-	2012	Yes	Rejected	Appeal pending before Cassation Court
11	Qusay Saeed Abed Abbas Al Mashhadani	Bodyguard	26/07/2012	No	No	8 months	Yes	Yes	Death	-	29/05/2015	Yes	Rejected	Appeal Pending before Cassation Court
12	Malik Abed Sultan Hamad	Was forced to confess under torture to being one of Al Hashimi's bodyguards — likely retaliation for having supported Al Hashimi in peaceful rallies	19/12/11	No	No	1 year	Yes	Yes	Death	746/C1/2012	17/02/2016	Yes	Rejected	Appeal pending before Cassation Court

Case number	Detainee's name	Connection with fatig Al Hashimi	Date of arrest	Arrest warrant	Access to lawyer/family	Duration of incommunicado detention	Interrogated without lawyer	Tortured	Sentence	Case number	Date of sentence	Request for retrial	Result	State of the proceedings
13	Mohammad Firas Bahr Shati	Was forced to confess under torture to being one of Al Hashimi's bodyguards — likely retaliation for having supported Al Hashimi in peaceful rallies	19/12/2011	No	No	1 year	Yes	Yes	Death	746/C1/2012	17/02/2016	Yes	Rejected	Appeal pending before Cassation Court
14	Hammad Zaidan Khalaf Al Fahdawi	Named in the confession of another detainee	17/03/2012	No	No	6 months	Yes	Yes	Death	-	2014	Yes	Rejected	Appeal pending before Cassation Court
15	Abdul Razak Abdul Rahman Hasan Al Dulaimi	Bodyguard	19/12/2011	No	No	1 year	Yes	Yes	Terrorism charges dismissed	659/C2/2017 and 1998/C2/2017	4/07/2017 18/08/2017	No	N/A	Awaiting trial
16	Rafid Walid Rachid Majid Al Obaidi	Former bodyguard	18/09/2012	No	No	6 months	Yes	Yes	15 years and death	-	2015 and 2016	Yes (2 requests submitted)	Partially accepted	No longer sentenced to death. Second request for retrial pending before Cassation Court
17	Hicham Ali Nayef Shatr	Bodyguard	19/12/2011	No	No	11 months	Yes	Yes	15 years	628/C3/2013	30/04/2013	Yes	Rejected on 15/06/2017	Appeal pending before Cassation Court. Awaiting trial related to four charges
18	Mustafa Mohammad AbdelKarim Salih Al Samurai Al Hasani	Doctor in the bodyguards' unit of Mr. Al Hashimi	11/07/2012	No	No	3 months	Yes	Yes	Death	-	27/10/2014	Yes	Rejected	Awaiting execution

Case number	Victim's name	Connection with Tariq Al Hashimi	Date of arrest	Arrest warrant	Access to lawyer/family	Duration of incommunicado detention	Interrogated without lawyer	Tortured	Sentence	Case number	Date of sentence	Request for retrial	Result	State of the proceedings
19	Ismail Nasif Jassim Al Mashhadani	Bodyguard	26/12/2011	No	No	1 year	Yes	Yes	Acquitted	1659/C2/2017 and 1998/C2/2017	4/07/2017 and 18/08/2017			Awaiting trial related to other charges
20	Ali Moussa Hussein Al Ameri	Bodyguard	20/12/2011	No	No	1 year	Yes	Yes	Death	1132/C1/2013	2013	Yes	Rejected on 29/10/2017	Appeal pending before Cassation Court
21	Salam Ashour Khalil Ibrahim Al Jumaili	Bodyguard	26/07/2012	No	No	1 year	Yes	Yes	Death	2138/C1/2014	3/12/2014	Yes	Rejected on 3/08/2017	Appeal pending before the Court of Cassation
22	Qusay Obaid Ibrahim Salloum	Brother of victim 23	22/10/2012	No	No	3 months	Yes	Yes	Life	1671/C1/2013	4/12/2013	Yes	Pending	
23	Loay Obaid Ibrahim Salloum	Bodyguard	22/10/2012	No	No	3 months	Yes	Yes	Death and 15 years	1783/C1/2013 and 1707/C3/2016	18/02/2015 and 31/05/2016	Yes	Pending	
24	Saad Alwan Hamadi Yassin Al Mashhadani	Bodyguard	2/01/2012	No	No	10 months	Yes	Yes	Acquitted	1238/C1/2016	12/06/2016			Awaiting trial related to other charges